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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MISAEL RAMIREZ, Defendant and Appellant.	H043973 (Santa Clara County Super. Ct. No. C1511453)

Defendant Misael Ramirez pleaded no contest to one count of possessing cocaine for sale (Health & Saf. Code, § 11351) and one count of transporting or selling cocaine (Health & Saf. Code, § 11352, subd. (a)). Defendant also admitted allegations that he possessed 57 grams or more of a substance containing at least five grams of cocaine or cocaine base (Pen. Code, § 1203.073, subd. (b)(1)). The trial court suspended imposition of sentence and placed defendant on formal probation for three years, with one year in county jail.

On appeal, defendant challenges a probation condition that provides that "all" of his electronic devices are subject to search and requires him to provide passcodes to conduct those searches. Defendant contends the condition is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*)[1] and is unconstitutionally overbroad and

[1] *Lent* was superseded on another ground as stated in *People v. Moran* (2016) 1 Cal.5th 398, 403, fn. 6 (*Moran*).

vague. We reject defendant's challenge under *Lent*. We also hold the condition is not unconstitutionally overbroad or vague. We will therefore affirm the order of probation.

I. FACTS & PROCEDURAL HISTORY[2]

A. The Offenses

In May 2015, a confidential informant reported that someone named "Sal" (later identified as defendant) was selling cocaine in Santa Clara County. On May 13, 2015, the informant arranged to meet with defendant at a location in Mountain View. During the meeting, defendant offered to sell the informant cocaine, but the informant said he did not have money to pay for it. During the next week, defendant and the informant "communicated" and set up another meeting so the informant could purchase nine ounces of cocaine for $9,400.00.

On May 21, 2015, defendant was the passenger in a vehicle that arrived at the designated location for the cocaine sale. Defendant used a cell phone to call the informant and ask why the informant was not there. An officer approached defendant and codefendant Jose Espinoza, who was in the driver's seat. Both were arrested and cell phones were seized from both men. Defendant's cell phone rang when an agent called the number associated with "Sal." Espinoza's phone contained text messages relating to drug transactions. A search revealed a canvas pouch containing nine ounces of cocaine and $1,950 cash on Espinoza.

B. Charges and Plea

Defendant and Espinoza were charged with one count of possessing cocaine for sale (Health & Saf. Code, § 11351) and one count of transporting or selling cocaine (Health & Saf. Code, § 11352, subd. (a)). The prosecution alleged that defendant and

[2] This case resolved before the preliminary hearing and the parties waived a full probation report. The parties agreed that the police reports provided a factual basis for defendant's pleas, and this court granted defendant's motion to augment the record with the police reports. Our summary of the facts is therefore taken from those reports.

Espinoza possessed 57 grams or more of a substance containing at least five grams of cocaine or cocaine base (Pen. Code, § 1203.073, subd. (b)(1)).

Defendant pleaded no contest to both counts and admitted the quantity allegations.

C. Sentencing Hearing

At the sentencing hearing held in September 2016, the prosecutor noted that the probation officer had not recommended any "cell phone search conditions" despite the fact that the case involved defendant "actually communicating via cell phone." The prosecutor asked the trial court to impose an electronics search condition.

The trial court agreed that because defendant had used a phone to arrange the drug sale, there was "a reasonable nexus" to an electronics search condition. The trial court then indicated it would order defendant "to consent to any search by any law enforcement agencies to search and seizure without cause to all electronic devices under your control to and including cell phones, computer --"

Defense counsel interrupted, saying, "I thought the request was only for the cell phone, not all [electronic devices]." He noted that if the condition extended to "all electronic devices," he objected "on due process, Fifth Amendment, overly broad, and no nexus to the other things."

The prosecutor argued that the condition was not "overly broad" because other electronic devices "can connect."

The trial court acknowledged "that the evidence we do have is they used a cell phone." However, the trial court reaffirmed that it was ordering that defendant consent to searches of "all electronic devices." The court explained that "[t]echnology is always changing" and "you can communicate by a number of means of electronic devices." The court reasoned that if defendant knew his cell phone was subject to search, he might use email or other forms of electronic communication instead.

The trial court also ordered defendant "to provide passwords necessary for the law enforcement agency to search those electronic devices."

II. DISCUSSION

Defendant argues the electronic devices search condition is unreasonable under *Lent* because it bears no relationship to his crimes and is not reasonably related to his future criminality. He contends the condition is unconstitutionally overbroad because it is not narrowly tailored so as to limit its impact on his rights to privacy, speech, and association. He contends the condition is unconstitutionally vague because it does not specify what electronic devices are included and does not specify the content that is subject to search. To the extent his trial counsel failed to make any of these arguments at the sentencing hearing, defendant argues he received constitutionally ineffective assistance of counsel. Defendant urges us to remand to the trial court to narrowly tailor a condition that allows for only a search of his cell phone and is limited to searches of telephonic, texting, and email communications. He agrees the trial court may impose a password condition to facilitate those more limited searches.

A. Forfeiture

The Attorney General concedes that the objection defendant raised at sentencing "can be reasonably interpreted" as including arguments that the electronic devices search condition is vague, overbroad, and unreasonable. However, the Attorney General contends that defendant waived any challenge to the order requiring he provide passwords to all of his electronic devices.

As noted above, defendant agrees the trial court could reasonably impose a password condition to facilitate limited searches of his cell phone. We do not understand him to be making a separate challenge to the password condition. Reasonably construed, the password condition was part and parcel of the electronics search condition. The "evident purpose of the password condition[]" was to implement the search condition. (See *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175 (*Ebertowski*).) Without passwords for defendant's electronic devices, the probation officer would not be able to search them under the search condition.

To the extent that the password condition was separate from the electronics search condition and is separately challenged on appeal, we believe an objection would have been futile, since the two conditions were interrelated and the trial court had just overruled defendant's objection to the electronics search condition. (See *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.) Thus, we find no forfeiture.

B. Standards of Review

We review the reasonableness of probation conditions for an abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) Whether a probation condition is unconstitutionally vague or overbroad is a question of law, which we review de novo. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888 (*Sheena K.*).)

C. Reasonableness Under Lent

Under the *Lent* test, " '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' " (*Olguin, supra,* 45 Cal.4th at p. 379.) The *Lent* test "is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]" (*Olguin, supra,* at pp. 379-380.)

Defendant points out that while he "used his cell phone as a telephonic device to communicate about potential sales of cocaine," there is no indication that he used any other electronic devices to engage in criminal activity and no indication he used the phone's other functions to engage in drug sales. Thus, he claims, the order that he permit searches of *all* of his electronic devices and provide passwords to all functions of those

devices has no relationship to his offenses. For the same reason, he asserts that the condition is not reasonably related to future criminality.

In *Ebertowski, supra,* 228 Cal.App.4th 1170, this court rejected a reasonableness challenge to two probation conditions. One condition required the defendant to submit to warrantless searches of "any electronic devices (including cellular phones, computers or notepads) within his or her custody or control" and to provide the passwords to such devices. (*Id.* at p. 1173.) The other condition required the defendant to "provide all passwords to any social media sites" and "submit said sites" to warrantless searches. (*Ibid.*)

The defendant in *Ebertowski* had threatened and physically resisted a police officer. He had also identified himself as a gang member and made gang signs. He subsequently pleaded no contest to making criminal threats and resisting arrest, and he admitted a gang enhancement allegation. (*Ebertowski*, *supra*, 228 Cal.App.4th at p. 1172.) After the prosecutor informed the trial court that the defendant had used a social media site to promote his gang, the court placed the defendant on probation with gang conditions and the electronic devices and social media conditions. (*Id.* at p. 1173.)

On appeal, the *Ebertowski* defendant challenged the electronic devices and social media conditions as both overbroad and unreasonable. This court found the conditions were reasonably related to the defendant's crimes as well as his future criminality, because they facilitated the effective supervision of the defendant's undisputed probation conditions, which included gang terms. The disputed conditions "were designed to allow the probation officer to monitor [the] defendant's gang associations and activities. . . . The only way that [the] defendant could be allowed to remain in the community on probation without posing an extreme risk to public safety was to closely monitor his gang associations and activities. The password conditions permitted the probation officer to do so. Consequently, the password conditions were reasonable under the circumstances, and

the trial court did not abuse its discretion in imposing them." (*Ebertowski, supra*, 228 Cal.App.4th at p. 1177.)

Defendant relies on *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*). In *Erica R.*, the juvenile court had declared the minor a ward of the court based on her unlawful *possession* of the drug Ecstasy (Health & Saf. Code, § 11377, subd. (a)). (*Erica R.*, *supra*, at p. 910.) The juvenile court had placed the minor on probation subject to a search condition that included her " 'electronics day or night at the request of a Probation Officer or peace officer' " and that required the minor to give her passwords to her probation officer. (*Ibid*.) The Court of Appeal concluded the condition was invalid under *Lent* and struck the condition. (*Erica R.*, *supra*, at p. 915.) As for the first prong of the *Lent* test, the court concluded there was "nothing in the original or amended juvenile petitions or the record that connects Erica's use of electronic devices or social media to her possession of any illegal substance" and there was no evidence she used an electronic device to purchase the drug. (*Erica R.*, *supra*, at p. 912.) Regarding the second prong, the court stated: "Obviously, the typical use of electronic devices and of social media is not itself criminal." (*Id.* at p. 913.) As for future criminality, the court stated, "There is nothing in this record regarding either the current offense or Erica's social history that connects her use of electronic devices or social media to illegal drugs. In fact, the record is wholly silent about Erica's usage of electronic devices or social media. Accordingly, '[b]ecause there is nothing in [Erica's] past or current offenses or [her] personal history that demonstrates a predisposition' to utilize electronic devices or social media in connection with criminal activity, 'there is no reason to believe the current restriction will serve the rehabilitative function of precluding [Erica] from any future criminal acts.' " (*Ibid*.)[3]

[3] The question whether an electronics search condition is reasonable under *Lent* when it has no relationship to the crimes committed but was justified as reasonably (continued)

The minor in *In re P.O.* (2016) 246 Cal.App.4th 288 (*P.O.*), another case cited by defendant, admitted committing misdemeanor public intoxication. (*Id.* at p. 292.) As a condition of his probation, the minor was required to submit to warrantless searches of his " 'electronics including passwords.' " (*Ibid.*) The primary issue in *P.O.* was whether the condition was reasonably related to the minor's future criminality, since the Attorney General had "effectively concede[d]" that the condition had no relationship to the minor's crime. (*Id.* at p. 294.) The Court of Appeal concluded that the condition was reasonably related to the minor's future criminality. The court explained, "[T]he condition reasonably relates to enabling the effective supervision of P.O.'s compliance with other probation conditions. Specifically, the condition enables peace officers to review P.O.'s electronic activity for indications that P.O. has drugs or is otherwise engaged in activity in violation of his probation." (*Id.* at p. 295.)

"[P]robation conditions authorizing searches 'aid in deterring further offenses . . . and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.' [Citation.] A condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, 'reasonably related to future criminality.' [Citations.]" (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381.) Probation search conditions are intended " 'to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches.' " (*People v. Ramos* (2004) 34 Cal.4th 494, 506.)

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related to future criminality because it facilitates supervision of the offender is pending review in the California Supreme Court in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923. The Supreme Court has also granted review and deferred briefing or further action pending its decision in *In re Ricardo P.* in more than 35 published and unpublished cases.

In our view, the condition requiring all of defendant's electronic devices to be subject to search is reasonably related to his future criminality. Since defendant used a cell phone to arrange drug transactions, it was reasonable for the trial court to give the probation officer the ability to ensure that defendant was not violating his probation by arranging drug sales through any electronic devices—whether a cell phone, laptop computer, or tablet. Although there is no evidence defendant used any electronic device other than a cell phone to conduct drug deals, it was permissible for the trial court to impose a more wide-ranging electronics search condition, "for conditions of probation aimed at rehabilitating the offender need not be so strictly tied to the offender's precise crime." (*Moran*, *supra*, 1 Cal.5th at pp. 404-405.) If the electronic devices search condition is limited to defendant's cell phone, he could easily circumvent the condition by using some other device, like a tablet computer or laptop, to sell narcotics using many of the same functions and applications that are on his cell phone.

Unlike the minor in *Erica R.*, who admitted simple drug *possession*, defendant was convicted of offenses related to *selling* narcotics. Allowing the probation officer to access defendant's electronic devies will facilitate defendant's supervision and can deter future criminality by ensuring that defendant does not attempt to resume selling drugs using his electronic devices. Given his use of a cell phone to commit his current offenses, we conclude the electronic devices search condition was reasonably related to future criminality. Thus, the electronic devices search condition is reasonable and valid.

D. Constitutional Overbreadth Challenge

In the context of probation conditions, the California Supreme Court has stated that a "condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

"The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to

which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' [Citation.]" (*United States v. Knights* (2001) 534 U.S. 112, 118-119 (*Knights*).) A person's status as a probationer subject to a search condition informs both sides of that balance because probationers enjoy a lesser expectation of privacy than the general public. (*Id*. at p. 119.)

Defendant relies on the United States Supreme Court's decision in *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*) and this court's decision in *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*). In *Riley*, the court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Riley, supra,* at p. __ [134 S.Ct. at pp. 2472-2473].) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id.* at p. __ [134 S.Ct. at p. 2489].) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Riley*, *supra*, at p. __ [134 S.Ct. at p. 2493].)

Riley is inapposite since it arose in a different Fourth Amendment context. *Riley* involved the scope of a warrantless search incident to arrest of a person who had not been found to have committed a crime beyond a reasonable doubt and who was not on supervised release. (*Riley, supra,* 573 U.S. at p. ___ [134 S.Ct. at pp. 2480-2481].) The balancing of the state's interests and the defendant's privacy interests is very different in this case, which involves the probation of a convicted felon. Moreover, *Riley* did not consider the constitutionality of conditions of probation. Persons on supervised release do not enjoy the absolute liberty to which every citizen is entitled and the court may impose reasonable conditions that deprive an offender of some freedoms enjoyed by law-abiding citizens. (*Knights, supra,* 534 U.S. at p. 119; see also *In re Q.R.* (2017)

7 Cal.App.5th 1231, 1238, review granted April 12, 2017, S240222 [*Riley* involved a person's "preconviction expectation of privacy"].)

This court rejected an overbreadth argument in *Ebertowski* where the challenged probation condition required the defendant to " 'provide all passwords to any social media sites, . . . and to submit those sites to search at any time without a warrant by any peace officer.' " (*Ebertowski*, *supra*, 228 Cal.App.4th at p. 1172.) As noted above, the defendant in *Ebertowski*, a member of a criminal street gang, had used social media to promote his gang. This court rejected the defendant's claim that the condition was "not narrowly tailored to [its] purpose so as to limit [its] impact on his constitutional rights to privacy, speech, and association" and concluded that the state's interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the condition, outweighed the minimal invasion of his privacy. (*Id.* at p. 1175.)

In *Appleton*, the defendant pleaded no contest to false imprisonment by means of deceit. (*Appleton*, *supra*, 245 Cal.App.4th at p. 720.) The trial court granted probation and imposed a condition making the defendant's computers and electronic devices " 'subject to forensic analysis search for material prohibited by law.' " (*Id*. at p. 721.) The only connection to electronic devices in *Appleton* was that the defendant met the minor victim on social media several months before the crime occurred. (*Id.* at pp. 719-720.) On appeal, the defendant challenged the search condition as both unreasonable and overbroad. (*Id*. at pp. 723-724.) The *Appleton* panel concluded that although the challenged condition was reasonable, it was unconstitutionally overbroad, and the panel remanded the case to the trial court to "consider fashioning an alternative probation condition." (*Id*. at p. 729.) Relying on *Riley*, the *Appleton* panel held that the condition was overbroad because it "would allow for searches of vast amounts of personal information" (*Appleton*, *supra*, at p. 727) that "could potentially expose a large volume of documents or data, much of which may have nothing to do with illegal activity,"

including "for example, medical records, financial records, personal diaries, and intimate correspondence with family and friends" (*id*. at p. 725). The *Appleton* panel concluded that "the state's interest here—monitoring whether defendant uses social media to contact minors for unlawful purposes—could be served through narrower means," such as by imposing "the narrower condition approved in *Ebertowski*, whereby defendant must provide his social media accounts and passwords to his probation officer for monitoring." (*Id*. at p. 727, fn. omitted.)

Here, the search condition regarding defendant's electronic devices properly serves the state's interest in preventing defendant from using electronic devices to engage in criminal activity such as the sale of narcotics. Indeed, defendant recognizes that some intrusion on his privacy rights would be justified, since he does not object to applying the electronic devices search condition to his cell phone. Moreover, electronic information is easily transferable between devices. By allowing the search of other electronic devices, the condition ensures that defendant is not engaging in narcotics sales by the use of any electronic device. As we have said, if the electronic devices search condition is limited to defendant's cell phone, he could easily circumvent the condition by using some other device, like a tablet computer or laptop, to sell narcotics using many of the same functions and applications that are on his cell phone, and the probation officer would not be able to effectively monitor defendant's activity while he is on probation.

For these reasons, we conclude the electronic devices search condition is not overbroad.

E. Constitutional Vagueness Challenge

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*Sheena K., supra,* 40 Cal.4th at p. 890.)

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. [Citations.]' [Citation.] The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application." [Citation.]' [Citation.] . . . In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context,*' and that, although not admitting of 'mathematical certainty,' the language used must have ' "*reasonable* specificity." ' [Citation.]" (*Sheena K., supra,* 40 Cal.4th at p. 890.)

In *In re Malik J.* (2015) 240 Cal.App.4th 896 (*Malik J.*), the appellate court considered whether a probation condition requiring the minor to " 'provide all passwords to any electronic devices, including cell phones, computers or [notepads], within [the minor's] custody or control' " was unconstitutionally vague. (*Id.* at p. 900.) The minor argued that the phrase " 'any electronic devices' " could be interpreted to include Kindles, Playstations, iPods, the codes to his car, home security system, or even his ATM card. (*Id.* at p. 904.) However, the appellate court concluded that the search condition was in response to the trial court's concern that the minor would use items such as his cell phone to coordinate with other offenders. Additionally, the minor had previously robbed people of their iPhones. (*Id.* at pp. 904-905.) Therefore, the appellate court concluded that it was reasonably clear that the condition was meant to encompass "similar electronic devices within [minor's] custody and control that might be stolen property, and not, as [minor] conjectures, to authorize a search of his Kindle to see what books he is reading or require him to turn over his ATM password." (*Id.* at p. 905.)

Defendant asserts that unlike in *Malik J.*, the context of the electronic devices condition was not made clear in this case. He also asserts that "there is no way to know" the scope of the condition and speculates that it could include not just communications but information such as the content of his bank accounts. We disagree. When imposing the condition, the trial court noted that because defendant had used a phone to arrange the drug sale, there was "a reasonable nexus" to an electronics search condition. It is reasonably clear that the probation condition authorizing warrantless searches of "all electronic devices" was meant to encompass cell phones and similar devices in defendant's possession that might be used to communicate for the purpose of arranging drug sales, so the probation officer can determine whether defendant is engaged in such communications. The condition is not reasonably read as authorizing a search of defendant's bank accounts or content that could not provide a means of facilitating a drug sale.

We conclude the electronic devices search condition is not unconstitutionally vague.

III. DISPOSITION

The order of probation is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

People v. Ramirez
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